Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT
OF THE UNITED STATES

SYED M. A. HASAN,
Petitioner,

v.

UNITED STATES DEPARTMENT
OF LABOR,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF *CERTIORARI*

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50 PP

QUESTIONS PRESENTED

In the proceeding below, the United States Court of Appeals for the Tenth Circuit held that the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851(b)(3), allowed the Secretary of Labor to dismiss an employment discrimination complaint, prior to discovery being had, on the grounds that the complainant failed to allege all of the elements of a *prima facie* case of employment discrimination.

In light of the broad remedial purpose of the ERA and Congress's intent that § 5851(b)(3) limit only the investigative stage of a proceeding thereunder, the Tenth Circuit's decision raises the following questions:

(1) Whether the so-called "gate keeping" provision, 42 U.S.C. § 5851(b)(3) applies to the *de novo* review stage before a Department of Labor administrative law judge; and

(2) Whether an ERA complaint may be dismissed for failure to allege the elements of a *prima facie* case prior to the complainant being afforded any discovery.

STATEMENT AS TO THE PARTIES

Pursuant to Sup. Ct. R. 14(1)(b), the petitioner makes the following statement. The petitioner, Mr. Hasan, was a complainant under the ERA in proceedings below before the Department of Labor, and was the petitioner in proceedings before the Tenth Circuit to review the Department of Labor's resultant decision.

The respondent, Department of Labor, was the adjudicative body which heard Mr. Hasan's complaint in an administrative proceeding, and was the respondent in proceedings before the Tenth Circuit.

Wolf Creek Nuclear Operating Corporation was the defendant in Mr. Hasan's case before the Department of Labor, and was an intervenor in the proceedings before the Tenth Circuit to review the Department of Labor's decision. Wolf Creek is not a party to this proceeding.

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OPINIONS BELOW

The Petitioner in this case, Mr. Syed M.A. Hasan, proceeding *pro se*, filed an employment discrimination complaint with the Occupational Health and Safety Administration ("OSHA") Wage and Hour Division on November 18, 1999.

On October 5, 2000, a Department of Labor Administrative Law Judge ("ALJ") issued a Recommended Decision and Order, denying Mr. Hasan's complaint. The ALJ's decision is reported as *Hasan v. Wolf Creek*, 00-ERA-14 (ALJ Oct. 5, 2000), and is reproduced herein at Appendix, p. A18.

Mr. Hasan perfected an appeal from the ALJ decision to the Department of Labor's Administrative Review Board ("ARB") and, on May 31, 2001, the ARB issued its Final Decision and Order upholding the ALJ's dismissal of Mr. Hasan's complaint. The ARB's decision is reported as *Hasan v. Wolf Creek*, 00-ERA-14 (ARB May 31, 2001), and is reproduced herein at Appendix, p. A9.

Mr. Hasan then timely petitioned the United States Court of Appeals for the Tenth Circuit for review of the ARB's Final Decision and Order. On April 26, 2002, a panel of the Tenth Circuit issued its decision upholding the ARB's Final Decision and Order. The Tenth Circuit's decision is reported as *Hasan v. Department of Labor*, 298 F.3d 914 (10th Cir. 2002), and is reproduced herein at Appendix, p. A1.

Following the Tenth Circuit panel's decision, Mr.

Hasan timely petitioned for rehearing and/or rehearing *en banc* and, on July 16, 2002, Mr. Hasan's petition was denied. The Tenth Circuit's one-page order denying rehearing is reproduced herein at Appendix, p. A25.

STATEMENT OF JURISDICTION

After a panel of the Tenth Circuit denied Mr. Hasan's petition for review of an order of the ARB on April 26, 2002, Mr. Hasan timely petitioned for rehearing and/or *en banc* rehearing. On July 16, 2002, a panel of the Tenth Circuit denied Mr. Hasan's rehearing petition.

This Petition for Writ of *Certiorari* is filed within 90 days of the Tenth Circuit's July 16, 2002 order denying Mr. Hasan's rehearing petition. This Petition is thus timely under Supreme Court Rule 13.1, and the Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

This case involves provisions of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851 *et seq*. Subsection (a) of the ERA makes it unlawful for any covered employer to retaliate against an employee for engaging in protected activity as defined in the Act. In relevant part, the ERA states:

(b) Complaint, filing and notification:

(1) Any employee who believes he has been discharged or otherwise discriminated against by any person in violation

of subsection (a) of this section may, within 180 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint, the (Nuclear Regulatory) Commission, and the Department of Energy.

(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this sub-paragraph. Within ninety days of receipt of such complaint, the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such a violation, issue an order either providing the relief prescribed by sub-paragraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing.

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(3)(A) The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2), unless the complainant has made a *prima facie* showing that any of the behavior described in sub-paragraphs (A) through (F) of sub-section (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

STATEMENT OF THE CASE

A. Statutory and Administrative Scheme.

This case arises under the whistleblower protection and anti-retaliation provisions of the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851 *et seq.*, and the Secretary of Labor's ("Secretary's") implementing regulations governing the conduct of whistleblower proceedings, 29 C.F.R. Part 24.

Under the ERA, once a complainant files a complaint with the Occupational Safety and Health Administration ("OSHA"), OSHA is required to conduct an investigation into the complainant's claims. 42 U.S.C. § 5851(b)(2)(A); 29 C.F.R. § 24.5. However, the ERA provides that the Secretary "shall not conduct the investigation . . . unless the complainant has made a *prima facie* showing" that the respondent's adverse action "was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. § 5851(b)(3).

The Secretary's implementing regulations take this so-called "gate keeping" provision into account, with respect to OSHA investigations under the ERA, and provide that:

> (b)(1) A complaint of alleged violation shall be dismissed unless the complainant has made a *prima facie* showing that protected behavior or conduct as provided in Sec. 24.4(b) was a contributing factor in the unfavorable personnel action alleged in the complaint.

- - -

(2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to meet the required elements of a *prima facie* case, as follows:

(i) the employee engaged in protected activity or conduct, set forth in Sec. 24.2;

(ii) the respondent knew that the employee engaged in the protected activity;

(iii) the employee has suffered an unfavorable personnel action; and

(iv) the circumstances were sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action.

29 C.F.R. § 24.5(b)(1) - (b)(2).

The Secretary's regulations further state:

> For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required elements of a *prima facie* case

29 C.F.R. § 24.5(b)(3).

If the OSHA investigation results in an unfavorable decision for the employee, the employee is entitled to a *de novo* review of his or her claim before the DOL's Office of Administrative Law Judges. 42 U.S.C. § 5851(b)(2)(A); 29 C.F.R. § 24.4(d)(3); § 24.6.

Once the complainant's case has passed from the OSHA investigatory stage to the OALJ adjudicatory stage, the Secretary's regulations in Part 24.5, which discuss making a *prima facie* showing on the face of the complaint, no longer apply, as they apply only to the investigative stage in ERA cases. *See, e.g.* 63 Fed. Reg. 6614, 6615 (Feb. 9, 1998) (explaining scope of newly-promulgated regulations).

Significantly, at the OALJ adjudicatory stage, the complainant's only burden is to comply with the ERA's general requirement that the complainant ultimately must make a *prima facie* showing. 42 U.S.C. § 5851(b)(3).

B. Facts and Procedural Background.

The petitioner in this case, Mr. Hasan, is a highly-qualified senior structural engineer, with over twenty years of experience in the nuclear industry.

In late 1999, Wolf Creek Nuclear Operating Corporation ("Wolf Creek"), an NRC licensee covered by the ERA's whistleblower protection provisions, was actively seeking to fill openings within its organization for structural engineers.

On November 6, 1999, in response to Wolf Creek's internet advertisement for engineers, Mr. Hasan submitted to Wolf Creek an application and personal resume, seeking a position as a structural engineer. To be "up front" with Wolf Creek, Mr. Hasan noted in his cover letter that he had, in the past, blown the whistle on "safety related design problems" by reporting them to the Nuclear Regulatory Commission. *See* R. 18.[1] Needless to say, Wolf Creek refused to hire Mr. Hasan.

After Wolf Creek refused to hire him, Mr. Hasan, proceeding *pro se*, filed a complaint with OSHA, dated November 18, 1999. Among other things, the DOL regulations allow for pleadings to be supplemented by way of a complainant's subsequent filings or responses to the respondent's filings, *see, e.g. Ruud v. Westinghouse*, No. 88-ERA-33, D&O of Remand, pp. 13-15 (ARB Nov. 10, 1997), so Mr. Hasan was entitled to supplement his pleadings at a later time.

In his complaint, Mr. Hasan alleged, *inter alia*, that: (1) he was a whistleblower who had engaged in protected conduct; (2) Wolf Creek took adverse action against him by refusing to hire him; and (3) Wolf Creek refused to hire him because of his protected conduct.

Shortly after filing his claim, Mr. Hasan supplemented his complaint by way of letter to OSHA, dated November 29, 1999. Therein, he alleged that: (1)

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1 The letter "R" followed by a number corresponds with the document given that number in the Department of Labor's certified list of documents, which formed the record before the Tenth Circuit below.

Wolf Creek had an open position for which he was qualified; (2) he applied for the position; and (3) his protected activity is "well known to Wolf Creek Nuclear Operating Corporation."

Mr. Hasan later repeated these allegations in two supplemental filings before the ALJ. In fact, he specifically re-alleged that Wolf Creek had a "good amount of work available for an engineer of my caliber, especially when I am willing to work for the above respondent at any location, for any shift, for any position and for any salary that the above respondent deems fit." In the same filing, Mr. Hasan noted to the ALJ that he had served discovery requests upon Wolf Creek, but that Wolf Creek had not complied with those requests.

Without ever complying with Mr. Hasan's discovery requests, Wolf Creek filed with the ALJ a motion to dismiss Mr. Hasan's complaint. R. 5. The ALJ ordered Mr. Hasan to show cause why Wolf Creek's motion should not be granted, R. 11, and, on May 22, 2000, Mr. Hasan submitted his response. R. 12.

Therein, Mr. Hasan again repeated his allegations against Wolf Creek. Specifically, he referred the ALJ to his initial and supplemental complaints, and re-alleged that Wolf Creek refused to hire him and hired others instead:

> The fact remains that I did apply to the respondent, in response to an internet advertisement, for a job (civil/structural engineer). . .*Other people have been hired.* This is positive proof of the substantiation of

my claim.

R.12, p. 6 (emphasis supplied).

Without scheduling a hearing or compelling Wolf Creek to comply with Mr. Hasan's discovery requests, and without actually holding a hearing, the ALJ issued a Recommended Decision and Order, on October 5, 2000, dismissing Mr. Hasan's claim. *See* App., p. A18.

Therein, keeping in mind that Mr. Hasan was afforded no discovery, the ALJ set forth the incongruous statement that "Complainant has the initial burden of proof in an environmental whistleblower proceeding to make a *prima facie* case. . ." App., p. A20. Applying that standard, the ALJ held that the third element of a *prima facie* case of discriminatory failure to hire requires a showing that "the position remained open and respondent continued to seek applicants of complainant's qualifications." App., p. A22.

In order to satisfy that element, the ALJ held, Mr. Hasan must "show that one or more employees" of the respondent knew of his protected activity. *Id.* The ALJ did not address Mr. Hasan's express claim that his protected activity is "well known to Wolf Creek," but rather held that Mr. Hasan's complaint should be dismissed because "Complainant does not allege this." App., p. A22.

Mr. Hasan timely appealed the ALJ's decision to the Department of Labor's ARB. On review, the ARB upheld the ALJ's dismissal of Mr. Hasan's complaint, specifically finding that Mr. Hasan failed to sufficiently allege that "the position remained open and the employer continued to seek

applicants with his qualifications." App., p. A14-A15.

Mr. Hasan timely petitioned the Tenth Circuit for review of the ARB's decision and, on April 26, 2002, a three-judge panel affirmed the ARB's decision. In its decision, the panel overturned the ARB's finding that Mr. Hasan had failed to sufficiently allege that Wolf Creek knew of his prior protected activity. The panel held that Mr. Hasan's application, which on its face recounted his past protected activity, was sufficient "to suggest an inference that the official knew of Mr. Hasan's protected activity." *See* App., p. A5.

However, the panel further held that "Mr. Hasan cannot meet the third element, as he did not sufficiently allege that respondents took some adverse action against him because of his protected activity." App., p. A6. Accordingly, the panel affirmed the ARB's dismissal of Mr. Hasan's complaint, solely on the ground that Mr. Hasan failed to fully plead a sub-element of the employment discrimination *prima facie* case. *See* App., p. A6 ("he did not sufficiently allege that respondent took some adverse action . . .") (emphasis supplied).

That decision conflicts with this Court's most recent ruling on the rules of pleading. In order to effectuate Congress' intent that the nuclear and environmental whistleblower laws be broadly construed to protect the public interest, this Court should grant *certiorari* and review the Tenth Circuit's decision.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S DECISION RAISES AN IMPORTANT QUESTION OF FEDERAL LAW.

A. The Tenth Circuit's Heightened Pleading Requirement is Improper.

The Tenth Circuit's decision in this case raises an important question of federal law. First, while the precise issue under the ERA has not been decided, the Tenth Circuit's decision conflicts with the pleading principles set forth by this Court, just last term, in *Swierkiewicz v. Sorema*, 534 U.S. 506, 122 S.Ct. 992 (2002).

Swierkiewicz involved a district court's dismissal of a plaintiff's Title VII claims on the grounds that the plaintiff failed to adequately state all of the elements of a *prima facie* case of employment discrimination. In that case, the district court found that the plaintiff had not "adequately alleged circumstances to support an inference of discrimination." *Swierkiewicz*, 122 S.Ct. at 996. The Court noted a division among the Courts of Appeals "concerning the proper pleading standard for employment discrimination cases," *id.*, and granted *certiorari*.

Upon review, this Court noted that the *prima facie* case of employment discrimination represents an evidentiary standard, not a pleading requirement, *Swierkiewicz*, 122 S.Ct. at 997, and further noted that it is improper to require a plaintiff to plead with specificity all of the elements of a *prima facie* case, because the *prima facie* case set forth set

forth in *McDonnell Douglas v. Green*, 411 U.S. 792, 802-804 (1973), does not apply in all cases. *Id.*

Moreover, the Court concluded, a rule requiring a plaintiff to plead with specificity each element of a *prima facie* case conflicts with the reality that:

> the precise requirements of the *prima facie* case can vary depending on the context and were never intended to be rigid, mechanized or ritualistic. Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required *prima facie* case in a particular case. Given that the *prima facie* case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Id., 122 S.Ct. at 997-998 (internal citations omitted).

Though the courts have frequently confused the purpose of the *prima facie* case in the past, this Court's decision in *Swierkiewicz* makes clear that it is improper to require a plaintiff to plead specific facts in support of each element of the *prima facie* case – especially without affording the plaintiff discovery.

Here, the Tenth Circuit panel did exactly what this Court rejected in *Swierkiewicz*, and judged the qualitative value of Mr. Hasan's allegations, which were made without the aid of discovery. The panel found them insufficient to state a claim under the third prong of the "failure to hire"

test set forth by the Tenth Circuit in its other employment discrimination decisions. Significantly, that element is not mentioned in the ERA.

The panel expressly held that Mr. Hasan "cannot meet the third element as he did not *sufficiently allege* that respondent took some adverse action against him because of his protected activity," App., p. A6, and that "Mr. Hasan failed to allege that a position for which he was qualified was available and that respondent either filled that position or continued to search for applicants for that position after refusing to hire him." App., p. A6. This Court thus needs go no further; the panel's conclusions facially violate the principle articulated by this Court in *Swierkiewicz*.[2]

The panel justifies its conclusion with the argument that the fact Mr. Hasan was afforded no discovery is really inconsequential, because his allegations were conclusory and his discovery requests were misplaced anyway. *See, e.g.* App., p. A6.

Significantly, under the principle articulated in *Swierkiewicz*, even if Mr. Hasan's allegation was "conclusory" and limited to the statement cited by the panel,

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2 Significantly, the DOL has fully adopted the Title VII framework, as articulated in *McDonnell Douglas*, to define a *prima facie* case under the ERA. *See Samodurov v. Niagara Mohawk*, No. 89-ERA-20, Decision and Order (Sec'y. Nov. 16, 1993). As such, the ARB is bound by *Swierkiewicz*.

that allegation would be sufficient to survive a motion to dismiss, for *Swierkiewicz* holds that there is no heightened pleading requirement, and that "an employment discrimination complaint need not contain *specific facts* establishing a *prima facie* case." *Swierkiewicz*, 122 S.Ct. at 995.

It is unclear how Mr. Hasan could possibly be expected to allege any more without being afforded the opportunity to learn additional facts in discovery. The fact is, however, Mr. Hasan did request relevant material in discovery. As the panel noted, Mr. Hasan had applied for a "civil/structural engineering position," App., p. A6, and he requested in discovery the "names, qualifications and experience of all civil/structural/pipe support engineers working for respondent." App., p. A6.

These requests go directly to the element on which the panel found Mr. Hasan's allegations lacking. Put simply, the "names" and "experience" of Wolf Creek's civil, structural and pipe support engineers would show which engineers were hired at what time – facts which would allow Mr. Hasan to ultimately prove that Wolf Creek hired engineers after he applied for and was denied a position.

As Judge Easterbrook of the Seventh Circuit stated, in a case this Court cites with approval in *Swierkiewicz*, "all a complaint has to say" in a race-based employment discrimination case, for example, is "I was turned down for a job because of my race." *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998). The same holds here: all Mr. Hasan had to say was that he was denied a job because of his whistleblowing.

That statement would fully comply with the ERA, 42 U.S.C. ' 5851(b)(3)(B), which only requires a complainant to make a "*prima facie* showing" that his protected activity was a "contributing factor in the unfavorable personnel decision alleged in the complaint."

Significantly, as set forth *supra*, the ERA "gate keeping" function applies only to the investigatory stage, and not the adjudicatory stage. *See, e.g. Stone & Webster Eng. Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997); 63 Fed. Reg. 6614, 6615 (Feb. 9, 1998) (provision a "limitation on the investigative authority of the Secretary of Labor").[3] As such, there is simply no heightened pleading requirement at the *de novo* review stage of an ERA proceeding before a Department of Labor ALJ. Accordingly, the Tenth Circuit's decision to the contrary is highly erroneous.

B. The Tenth Circuit Rule Raises an Important Question of Federal Law.

It is well-settled that Congress intended the ERA to promote public health and safety by providing a safe haven for whistleblowers to report threats thereto. *See, e.g. English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270 (1990). The courts have long held that Congress intended the ERA to be broadly-construed, *see, e.g. DeFord*

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3 The cases are not directly on all fours, but to the extent the Tenth Circuit's decision in this case applied the so-called "gate keeping" function to the adjudicatory stage of an ERA proceeding, it creates a division in the circuits, as the Eleventh Circuit recognized in *Stone & Webster* that the function applies to the investigative stage.

v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983); *Passaic Valley Sewerage Comm. v. Department of Labor*, 992 F.2d 474, 479 (3d Cir. 1992), so as to effectuate its remedial purpose, *see, e.g. Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985).

In accordance with this underlying philosophy, the courts have noted that the employee protection provisions in the nuclear and environmental statutes truly "represent the public interest." *See Beliveau v. Department of Labor*, 170 F.3d 83, 87-88 (1st Cir. 1999).

The Tenth Circuit's decision completely vitiates the Congressional purposes behind the principles these courts have articulated. To wit, in its mis-application of the federal pleading rules, which the ARB has adopted, the Tenth Circuit has construed the ERA narrowly and has effectively taken away the safe haven the ERA was intended to create for nuclear whistleblowers.

Given that the ARB oversees the adjudication of claims under all of the environmental and nuclear employee-protection laws, and uses the same rules of pleading and *McDonnell Douglas*-type burden-shifting schemes in all of its employment discrimination cases, this new rule will have broad application.

That broad application highlights the importance of the question raised by the Tenth Circuit's rule. For, without the safe haven provided by laws like the ERA, would-be whistleblowers will be less likely to even bring ERA claims for fear of having no real remedy.

For all but the bravest, then, the Tenth Circuit's ruling will have a chilling effect. As the various Courts of Appeals have noted, *supra*, it is in the public interest for whistleblowers to report suspected health and safety violations. The chill cast by the Tenth Circuit's decision thus has the potential to severely harm the public interest by reducing the number of whistleblowers who are willing to come forward.

This Court can protect the public interest – and can restore the ERA's safe haven as Congress intended – by granting *certiorari* and overturning the Tenth Circuit for its failure to abide by the pleading principles articulated in *Swierkiewicz*.

CONCLUSION

For the foregoing reasons, this Court should grant *certiorari* and review the Tenth Circuit's decision in this case.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-9521

SYED M.A. HASAN,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent.

WOLF CREEK NUCLEAR OPERATING CORPORATION,
Intervenor.

ORDER

Filed July 26, 2002

Before SEYMOUR, McKAY, and MURPHY, Circuit Judges.

This matter is before the court on Winston & Strawn's motion to publish the order and judgment filed on April 26, 2002. The motion is granted. A copy of the published opinion is attached to this order.

Entered for the Court
PATRICK FISHER, Clerk of Court

by:
Deputy Clerk

United States Court of Appeals
Tenth Circuit

APR 26 2002

PATRICK FISHER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 01-9521

SYED M.A. HASAN,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent.

WOLF CREEK NUCLEAR OPERATING CORPORATION,
Intervenor.

PETITION FOR REVIEW
OF AN ORDER OF THE UNITED STATES
DEPARTMENT OF LABOR
(No. 01-006)

Submitted on the briefs:

Syed M.A. Hasan, pro se.

Howard M. Radzely, Acting Solicitor of Labor, Steven J. Mandel, Associate Solicitor, Paul L. Frieden, Counsel for Appellate Litigation, and Lois R. Zuckerman, Attorney, U.S. Department of Labor, Washington, D.C., for Respondent.

Warren B. Wood, of Wolf Creek Nuclear Operating Corporation, Burlington, Kansas, and J. Patrick Hickey and Tiffany L. Powers of Shaw Pittman LLP, Washington, D.C., for Intervenor.

Before SEYMOUR, McKAY, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

In 1999, petitioner Syed M.A. Hasan applied for a position with respondent Wolf Creek Nuclear Operating Corporation as a civil/structural engineer.(1) He stated he was willing to work anywhere in the United States or overseas at any salary respondent considered reasonable. In his application letter, Mr. Hasan also informed Wolf Creek that he had found it necessary to contact the United States Nuclear Regulatory Commission about safety problems he had encountered in a previous position. When he had not heard from Wolf Creek within two weeks, Mr. Hasan filed this complaint, pursuant to 42 U.S.C. § 5851, with the Occupational Safety and Health Administration (OSHA)

alleging Wolf Creek had refused to hire him in retaliation for his prior whistleblowing activities. After OSHA found no merit to his complaint, his case was referred to an administrative law judge (ALJ) for(1) disposition. The ALJ recommended dismissing the action for failure to state a claim. The **Administrative Review Board** (ARB) accepted the recommendation. Mr. Hasan then filed this petition for review.(2)

In his petition for review, Mr. Hasan argues that the ARB's decision was illegal because the ARB did not review the entire record. Mr. Hasan also contends he was denied discovery and Wolf Creek did know of his prior protected activities when he was denied employment.

In reviewing the agency's decision, we examine whether the agency "(1) acted within the scope of [its] authority, (2) complied with prescribed procedures, and (3) took action that was neither arbitrary and capricious, nor an abuse of discretion." *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1231 (10th Cir. 2000) (citation omitted). "We review matters of law *de novo*." *Id.* (quotation omitted).

The Energy Reorganization Act prohibits employers from discriminating against any employee "with respect to his compensation, terms, conditions, or privileges of employment" because the employee engaged in protected whistleblowing activity. 42 U.S.C. § 5851(a). Congress amended § 5851 of the Act in 1992 to include a gatekeeping function which prohibits the Secretary from investigating a complaint unless the complainant establishes a prima facie case that his protected behavior was a contributing factor in the unfavorable personnel action alleged in the complaint. *See* § 5851(b)(3)(A); *see also Trimmer v. United States Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999).

To determine whether Mr. Hasan could proceed beyond the § 5851(b)(3) barrier, the ARB examined whether (1) he "engaged in protected conduct; (2) the employer was aware of that conduct; (3) the employer took some adverse action against him; and (4) there is evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action." R. 23 at 4. The third element is subdivided into three prongs. The complainant "must allege: 1) that he applied and qualified for a job for which the employer was seeking applicants; 2) that, despite his qualifications, he was rejected; and 3) that after his rejection, the position remained open and the employer continued to seek applicants with his qualifications."(3) *Id.* at 5.

The ARB determined that Mr. Hasan had established the first element, but could not establish the remaining elements. As to the second element, Mr. Hasan argues he did establish that the person who made the decision not to hire him was aware of his prior whistleblowing activities because he had included that fact in his application letter. We agree. The ARB concluded that Mr. Hasan had only speculated that the hiring official must have known of his protected activity. The ARB further supported its conclusion citing to a case Mr. Hasan had filed against a different prospective employer wherein the hiring official averred he had not seen Mr. Hasan's application letter. However, Mr. Hasan sent his application letter in which he set forth his prior whistleblowing activities to respondent. Mr. Hasan need not further allege that the official in charge of hiring saw that letter; the pleaded facts are sufficient to suggest an inference that the official knew of Mr. Hasan's protected activity.

While we cannot affirm the ARB's determination on this element, Mr. Hasan still cannot proceed past the

gatekeeping barrier. Mr. Hasan cannot meet the third element as he did not sufficiently allege that respondent took some adverse action against him because of his protected activity. The ALJ determined that Mr. Hasan had sufficiently alleged that he applied for and was qualified for a job for which respondent was seeking applicants and despite his qualifications, he was rejected. The ALJ concluded, and the ARB affirmed, however, that Mr. Hasan had not sufficiently alleged that after his rejection, the position remained open and respondent continued to seek applicants with his qualifications.

The record shows that Mr. Hasan applied for any senior civil/structural engineering position at any salary in any location for which he was qualified. Mr. Hasan failed to allege that a position for which he was qualified was available and that respondent either filled that position or continued to search for applicants for that position after refusing to hire him. He merely made the conclusory statement that a company the size of respondent's always has positions open. This statement is insufficient to establish the third prong.

Further, none of the discovery Mr. Hasan sought was directed towards meeting this prong. Mr. Hasan sought discovery of all documents in respondent's possession which in any way concerned or mentioned him as well as reports of all verbal contacts with anyone about him. He sought the names, qualifications and experience of all civil/structural/pipe support engineers working for respondent as well as all contractors, subcontractors, and architectural and engineering firms contracting with respondent in all locations. Finally, he sought all information about any of respondent's employees or other job applicants who had filed **whistleblower** complaints. *See* R. Mot. for Protective Order, Ex. 1. None of this

information would establish that respondent hired someone with Mr. Hasan's qualifications to fill an open position or that respondent continued to seek someone with Mr. Hasan's qualifications for an open position. Thus, the ARB's decision to dismiss this action prior to discovery did not affect Mr. Hasan's ability to state a viable claim.

As Mr. Hasan could not meet the required § 5851 gatekeeping elements, the ARB's action was neither arbitrary and capricious, nor an abuse of discretion. *Wyo. Farm Bureau Fed'n*, 199 F.3d at 1231. The ARB properly dismissed this complaint. The petition for review is DENIED.

[ENDNOTES]

(1) Mr. Hasan also applied for and failed to obtain a position with Wolf Creek in 1994. Although he included facts stemming from the 1994 application in his complaint, he indicated in his brief before the ARB and to this court that his purpose for including the 1994 information was solely for background evidence for his 1999 rejection, rather than to affirmatively state a claim for relief on the 1994 rejection. We, therefore, do not address the timeliness of any claim relating to the 1994 application and subsequent rejection.

(2) After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

(3) Mr. Hasan does not challenge the Secretary's delineation of the elements of a prima facie case. We are concerned, however, that the Secretary's articulation of the third prong is too limited. See Amro v. Boeing Co., 232 F.3d 790, 796

&n.2 (10th Cir. 2000) (clarifying that plaintiff may establish this element in a number of ways including that position for which he was not hired *was filled or remained open* following rejection of the plaintiff's application). In our discussion, we address both possibilities.

***Hasan v. Stone & Webster Engineers & Constructors, Inc.*, ARB No. 01-006, ALJ No. 2000-ERA-14 (ARB May 31, 2001)**

U.S. Department of Labor	Administrative Review Board 200 Constitution Avenue, N.W. Washington, D.C. 20210

ARB CASE NO. 01-006
ALJ CASE NO. 2000-ERA-14
DATE: May 31, 2001

In the Matter of:

SYED M.A. HASAN,
COMPLAINANT,

v.

WOLFE CREEK NUCLEAR OPERATING CORP.,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1]

Appearances:

For the Complainant:
Syed M.A. Hasan, *pro se,*
Madison, Alabama

For the Respondent:
J. Patrick Hickey,
Shaw Pittman, Washington, D.C.

FINAL DECISION AND ORDER
BACKGROUND

This case arises under the employee protection provisions of the Energy Reorganization Act ("ERA"), which prohibit an employer from discriminating against or otherwise taking unfavorable personnel action against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee engaged in protected whistleblowing activity. 42 U.S.C.A. §5851 (West 1995). This case is one of many that Complainant Syed Hasan has filed against various companies for failing to hire, retain, or rehire him.[2]

[Page 2]

According to Hasan, he applied for a job with Respondent as a "civil/structural/pipe support engineer" in December 1994, on June 11, 1999, and on November 6, 1999. As part of his November 6, 1999 application, Hasan informed Respondent that he has a history of whistleblowing activity. When he did not receive a favorable reply to his application by November 18, 1999, Hasan filed a complaint with the Occupational Safety and Health Administration ("OSHA")[3] alleging that Respondent refused to hire him because he was a whistleblower. OSHA found no merit to Hasan's complaint. Hasan objected to that determination, and the case was referred to an Administrative Law Judge ("ALJ") for disposition.

After participating in discovery, Respondent advised the ALJ that Hasan's complaint was time-barred with regard to the 1994 application because it was not filed within 180 days of the alleged violation as required by the ERA. Respondent also asserted, among other things, that:

In order to survive a pre-hearing Motion to Dismiss for failure to state a claim, it is not enough for the Complainant to simply state that he remained unemployed after submitting a resume to the employer. Rather the Complaint must allege with sufficient specificity that the Complainant applied for a particular opening for which he was qualified and that after such rejection, the position remained open and the employer continued to seek applicants from among those persons with his qualifications.

Respondent's Memorandum of Law in Support of Its Motion to Dismiss at 6-7. Therefore, Respondent moved to dismiss the complaint because it was untimely filed with regard to the 1994 application and because it failed to allege essential elements of a *prima facie* case concerning the 1999 applications. *Id.*

Hasan opposed the motion to dismiss asserting that he submitted his application in response to an advertisement on the internet. However, Hasan did not allege that his complaint with regard to the 1994 application was timely. He also did not allege that the position for which he applied in 1999 remained open and that Respondent continued to seek applicants from among those persons with his qualifications.

By Order dated April 20, 2000, the ALJ directed Hasan to show cause why his complaint should not be dismissed for failure to state a claim upon which relief could be granted. In his response, Hasan did not address the timeliness issue

nor did he assert that the position remained open and that Respondent continued to seek other applicants. Instead, he asserted, among other things, that Respondent was aware of his protected activities either through its counsel or through an employee that he identified only as "engineer H."

[Page 3]

The ALJ concluded that the complaint regarding the 1994 application was time-barred because it was filed beyond the 180-day time limit under the ERA. As to the 1999 applications, the ALJ found that Hasan had not asserted that the position in question remained open and that Respondent continued to seek applicants with his qualifications. In the absence of such allegation, the ALJ found that Hasan had failed to allege an essential element of a *prima facie* case. Additionally, the ALJ found that Hasan's case was further defective in that he had not alleged facts sufficient to establish that Respondent was aware of his protected activity. Specifically, the ALJ stated:

Complainant's statements, taken as true, do not amount to a prima facie case that Respondent had knowledge of Complainant's protected activity. Complainant does not allege that any employee responsible for, or having input in, the hiring practices of Respondent had any knowledge of his protected activity. The only people Complainant alleges to have knowledge of his protected activity is counsel for Respondent and "H", but he does not allege that either of these persons had any input in the hiring decisions of Respondent.

Consequently, by Order issued October 11, 2000 ("RD&O"), the ALJ recommended that the complaint be dismissed. This appeal followed.

JURISDICTION

We have jurisdiction pursuant to 42 U.S.C.A. §5851 and 29 C.F.R. §24.8.

STANDARD OF REVIEW

Under the Administrative Procedure Act, we have plenary power to review an ALJ's factual and legal conclusions *de novo*. See 5 U.S.C.A. §557(b) (West 1996); *Masek v. Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000).

DISCUSSION

To state a claim under the ERA, the complainant must allege that: (1) the complainant engaged in protected conduct; (2) the employer was aware of that conduct; (3) the employer took some adverse action against him; and (4) there is evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action. *Carroll v. Bechtel Power Corp.*, No. 91-ERA-46, slip op. at 9 (Sec'y Feb. 15, 1995) (citing *Dartey v. Zack Co. of Chicago*, No. 82-ERA-2, slip op. at 7-8 (Sec'y Nov. 13, 1991), *aff'd sub nom, Carroll v. Dep't of Labor*, 78 F.3d 352 (8th Cir. 1996). *See also McCuistion v. TVA*, No. 89-ERA-6, slip op. at 6 (Sec'y Nov. 13, 1991); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983).

[Page 4]

In this case, Hasan alleged that, while working for another employer, he reported safety concerns to the Nuclear Regulatory Commission. That allegation is sufficient to establish the first element of a *prima facie* case. However,

he has not pled facts sufficient to establish the remaining elements.

To satisfy the second element, Hasan must allege that at least one of the employees responsible for, or having input in, the hiring practices of Respondent knew about his protected activity. *See Floyd v. Arizona Public Service Co.*, No. 90-ERA-39 (Sec'y Sept. 23, 1994). Rather than allege facts, Hasan merely speculated that either Respondent's counsel or "engineer H" informed the hiring officials of his protected activity.[4] According to Hasan, if the ALJ had granted him discovery and held a hearing, he would have been able to establish the facts in support of his claim.

Hasan must support his claim with more than mere speculation. As we have held before, a complainant cannot simply "file a conclusory complaint not well-grounded in fact, conduct a fishing expedition for discovery, and only then amend his complaint in order to finally set forth well-pleaded allegations." *Hasan v. Commonwealth Edison Co. and the Estes Group, Inc.*, ARB No. 00-028, ALJ No. 00-ERA-01, slip op. at 5 (ARB Dec. 29, 2000). Inasmuch as Hasan has not alleged that at least one of the employees responsible for making hiring decisions knew about his protected activity, he has not satisfied the second element of a *prima facie* case.

With regard to the third element, the Secretary has previously recognized that there are three factors that must be considered in determining whether a refusal to hire constitutes an adverse action. *Samodurov v. General Physics Corp.*, No. 89-ERA-20 (Sec'y Nov. 16, 1993). Under *Samodurov*, the complainant must allege: 1) that he applied and qualified for a job for which the employer was seeking applicants; 2) that, despite his qualifications, he was rejected; and 3) that after his rejection, the position

remained open and the employer continued to seek applicants with his qualifications. Although Hasan has alleged facts sufficient to satisfy the first two prongs of the *Samodurov* test, he has not alleged that, following his rejection, the position remained open and the employer continued to seek applicants with his qualifications. Thus, Hasan has failed to establish the third element of a *prima facie* case. In light of Hasan's failure to allege two essential elements of a *prima facie* case, we concur with the ALJ that this complaint should be dismissed.[5]

SO ORDERED.

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Alternate Member

[ENDNOTES]

[1] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

[2] *Hasan v. Florida Power & Light Co.,* ARB No. 01-004, ALJ No. 2000-ERA-12 (ARB May 17, 2001); *Hasan v. Sargent & Lundy*, ARB No. 01-001, ALJ No. 2000-ERA-7 (ARB Apr. 30, 2001); *Hasan v. Commonwealth Edison Co.,* ARB Nos. 01-002, 01-003; ALJ Nos. 2000-ERA-8, 2000-ERA-11 (ARB Apr. 23, 2001); *Hasan v. Commonwealth Edison Co.*, ARB No. 01-005, ALJ No. 2000-ERA-13 (ARB Apr. 23, 2001); *Hasan v. Burns & Roe Enterprises, Inc.,* ARB No. 00-080, ALJ No. 2000-ERA-6 (ARB Jan. 30, 2001); *Hasan v. Commonwealth Edison Co.*, ARB No. 00-028, ALJ No. 2000-ERA-1, (ARB Dec. 29, 2000); *Hasan v.*

Intergraph Corp., ARB No. 97-016, ALJ No. 96-ERA-17, (ARB Aug. 6, 1997); *Hasan v. Bechtel Power Corp.*, No. 94-ERA-21 (Sec'y Mar. 16, 1995); *Hasan v. Bechtel Power Corp.*, No. 93-ERA-40 (Sec'y Feb. 13, 1995); *Hasan v. System Energy Resources, Inc.*, No. 89-ERA-36 (Sec'y Sept. 23, 1992); *Hasan v. Nuclear Power Services, Inc.*, No. 86-ERA-24 (Sec'y June 26, 1991); *Hasan v. Stone & Webster Engineers and Constructors, Inc.*, ARB No. 01-007, ALJ No. 2000-ERA-10 (ALJ Oct. 5, 2000); *Hasan v. Sargent & Lundy,* No. 96-ERA-27 (ALJ Nov. 4, 1996); *Hasan v. Bechtel Power Corp.*, No. 93-ERA-22 (ALJ Dec. 8, 1994); *Hasan v. Nuclear Power Services Inc.*, No. 86-ERA-36 (ALJ July 27, 1989).

[3] OSHA is the agency within the Department of Labor ("DOL") charged with investigating ERA whistleblower complaints. See 29 C.F.R. §§24.4, 24.5 (2000).

[4] Hasan asserts on appeal that Respondent had to be aware of his protected activity because he disclosed it in his November 6, 1999 letter. However, Hasan did not raise this argument in response to the ALJ's show cause order. We decline to consider this argument for the first time on appeal and, instead, limit our review to the record established before the ALJ. Moreover, even accepting Hasan's statement, Hasan nevertheless failed to satisfy the second element of his *prima facie* case. An allegation that the Respondent must have known of his protected activity is insufficient, standing alone, to establish that one of the employees responsible for or having input in the decision to reject Hasan's application for employment knew about his protected activity. *Accord Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 5-7 & n.8 (ARB Jan. 30, 2001) (The complainant failed to establish a *prima facie* case where the hiring official averred that he did not see the letter in which the

complainant revealed his whistleblowing activities prior to making the decision not to hire the complainant.).

[5] Hasan has raised a number of other arguments in this case. The Board finds those arguments without merit and they do not warrant a separate discussion in this Order.

***Hasan v. Wolfe Creek Nuclear Operating Corp.*, 2000-ERA-14 (ALJ Oct. 5, 2000)**

U.S. Department of Labor
Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)

DATE: OCTOBER 5, 2000

CASE NO.: 2000-ERA-14

In the Matter of:

SYED M. A. HASAN
Complainant

v.

WOLFE CREEK NUCLEAR OPERATING CORPORATION
Respondent

RECOMMENDED DECISION AND ORDER DISMISSING CLAIM

Procedural and Factual Background

The above-captioned case has not yet been scheduled for hearing. Respondent's counsel submitted a Motion To Dismiss on March 15, 2000. Respondent alleges that Complainant has failed to state a claim upon which relief can be granted. Complainant was ordered by this Court to show cause why his complaint should not be dismissed. On May 22, 2000 Complainant submitted his Response to Show Cause Order. Complainant failed to submit evidence to this Court which alleged any set of facts upon which relief could be granted.

Complainant filed the instant complaint on November 18, 1999, alleging violations of Section 211 of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988 and Supp. IV 1992) and the regulations promulgated thereunder at 29 C.F.R. Part 24. Specifically, Complainant alleged that he was not hired by Respondent, Wolf Creek Nuclear Operating Corporation because he had engaged in activities protected under the provisions of the ERA.[1] Complainant alleges that in December 1994, on June 11, 1999,[2] and November 6, 1999, he applied "for a job as a civil/structural/pipe support engineer" with Respondent. Approximately two weeks after Complainant applied for the position in 1999, he filed this complaint with the Secretary of Labor alleging discrimination and retaliation based on Respondent's failure to hire him.

[Page 2]

The complaint was investigated and found to have no merit by the Secretary of Labor on February 17, 2000. Complainant filed objections and requested a hearing before an Administrative Law Judge on February 23, 2000. The case was referred to the Office of Administrative Law Judges on February 28, 2000.

Applicable Law

Any employer who "intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has: (1) Commenced or caused to be commenced...a proceeding under on of the Federal statutes listed in § 24.1(a)..." is deemed to have violated the federal law and regulations in Part 24. 29 C.F.R. § 24.2(b).

Neither 29 C.F.R. Part 24 (whistle blower proceedings) nor 29 C.F.R. Part 18 (procedures for administrative law judge hearings) address dismissal for failure to state a claim, therfore, the standards set out in the Federal Rules of Civil Procedure are applicable. Glenn v. Lockheed, 1998 ERA 35 and 50 (ALJ July 15, 1999). Under Federal Rule of Civil Procedure 12(b)(6), dismissal may be appropriate when the facts in the case fail to state a claim. Id. In considering whether a dismissal is appropriate, the facts alleged in the complaint are taken as true, and all reasonable inferences are made in favor of the non-moving party. If the factual allegations, after having been accepted as true and construed most favorably on behalf of the non-moving party, present a cognizable claim if proved by a preponderance of the evidence, dismissal is not proper. Jones v. City of Lakeland, Tennessee, 175 F.3d 410 (6th Cir. (Tenn.) 1999). However, failure to allege a prima facie case is grounds for immediate dismissal. See Lovermi v. Bell South Mobility, Inc., 962 F. Supp. 136, 139 (S.D. Fla. 1997); Briggs v. Sterner, 529 F. Supp. 1155, 1164 (S.D. Iowa 1981).

A. Elements and Burden of Proof

Complainant has the initial burden of proof in an environmental whistle blower proceeding to make a prima facie case which shows that: (1) complainant engaged in a

protected activity; (2) complainant was subjected to adverse action; (3) respondent was aware of the protected activity when it took the adverse action; and, (4) the evidence is sufficient to raise a reasonable inference that the protected activity was the likely reason for the adverse action. Glenn, 1998 ERA at 7. If Complainant has succeed in establishing the foregoing, Respondent must produce evidence of a legitimate, nondiscriminatory reason for the adverse action. Frady v. Tennessee Valley Authority, 92-ERA-19 (Sec'y Oct. 23, 1995) The complainant bears the ultimate burden of persuasion that Respondent's reasons are not the true reasons for the adverse action, but a pretext for discrimination. Id. At all times, Complainant bears the burden of establishing by a preponderance of the evidence that the adverse action was in retaliation for the protected activity. Id.

[Page 3]

Complainant alleges that he engaged in a protected activity by his reporting of safety concerns to the United States Nuclear Regulatory Commission. Complainant has established the first element required to establish a prima facie case of retaliation.

The second requirement for a prima facie case of retaliation requires adverse action on the part of the Respondent. When determining whether a complainant has established an actionable adverse action in a failure to hire case, the framework of a prima facie case outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) applies. Webb v. Carolina Power & Light Co., 93 ERA 42, 12 (ALJ July 24, 1996) ((aff'd, ARB August 26, 1997). In order to establish a prima facie case of discriminatory refusal to hire, the complainant must show: (1) that he applied and was qualified for a job for which the

employer was seeking applicants; (2) that, despite his qualifications, he was rejected; and (3) that, after his rejection, the position remained open and that employer continued to seek applicants from persons of complainant's qualifications. Id.

Complainant alleged in his March 15, 2000 Response to Respondent's Motion to Dismiss that he mailed his resume to Respondent in December, 1994, June 1999, and November 1999, in response to an Internet advertisement for a civil/structural engineer position. Complainant does allege the first element required to establish a prima facie case of discriminatory refusal to hire. Complainant further alleges the second element, that he was not hired by Respondent. However, Complainant does not allege the third element, that the position remained open and Respondent continued to seek applicants of Complainant's qualifications. As such, Complainant has not alleged a prima facie case of adverse action on the part of Respondent and has failed to meet the second requirement.

In satisfaction of the third requirement, Complainant alleges that he was not hired by Respondent in retaliation for engaging in a protected activity. To satisfy the third element, Complainant must show that one or more employees of Wolf Creek Nuclear Operating Corporation who had substantial input in the hiring decision had knowledge of the protected activity during the relevant time period. Id. at 6-7; Floyd v. Arizona Public Service Co., 90-ERA-39, 5 (Sec'y Sept. 23, 1994). Complainant does not allege this. In his November 18, 1999, complaint he alleged only that "[b]ased on my prior whistle blowing activities protected under ERA, WOLF CREEK NUCLEAR OPERATING COROPORATION is depriving me of my livelihood, FOR REFUSING TO HIRE ME, IN RETALIATION for reporting the safety concerns to the United States Nuclear

Regulatory Commission (NRC)...." Complainant, in his May 23 , 2000 Response to Respondent's Motion to Dismiss, states that counsel for Respondent, Mr. Hickey, has been representing Respondent and several other companies in ERA cases "for years" and that Complainant had filed other complaints against employers under the ERA.

Complainant further states that an engineer, "H", who is currently employed by Respondent, worked with Complainant at the Comanche Peak Nuclear Power Plant and "has to be aware" of his whistle blowing activities at Comanche Peak. In addition, Complainant states that his name was in the newspapers and is on the internet at the Office of Administrative Law Judges web site as suing companies for ERA violations.

Complainant's statements, taken as true, do not amount to a prima facie case that Respondent had knowledge of Complainant's protected activity. Complainant does not allege that any employee responsible for, or having input in, the hiring practices of Respondent had any knowledge of his protected activity. The only people Complainant alleges to have knowledge of his protected activity is counsel for Respondent and "H", but he does not allege that either of these persons had any input in the hiring decisions of Respondent. Complainant has failed to allege the third requirement for a prima facie case of retaliation.

The fourth requirement to allege a prima facie case of retaliation by Complainant is that there is sufficient evidence to raise a reasonable inference that the protected activity was the likely reason for the adverse action. Because Complainant has not alleged a prima facie case of adverse action or that Respondent had knowledge of the protected activity, he has not met this requirement.

After a careful review of the record, Complainant has failed to set forth a prima facie case of proscribed behavior, or provide a full statement of the acts and omissions, with pertinent dates, which are believed to constitute a violation. 29 C.F.R. § 24.5(a)(2). In addition, Complainant's complaint, as pled, fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

B. Timeliness

Complainant's allegation of a discriminatory refusal to hire based on his December, 1994, application is time-barred. Under the ERA, Complainant must file a complaint within 180 days of the alleged violation. 42 U.S.C. § 5851 (b)(1). Complainant did not file the instant complaint until November 18, 1999. The statute of limitations bars this claim.

Accordingly,

ORDER

It is ORDERED that the Complaint of Syed M A. Hasan be, and is hereby, dismissed.

ROBERT J. LESNICK
Administrative Law Judge

RJL/lb [ENDNOTES]

[1] Specifically, Complainant filed safety complaints against his former employer.

[2] Complainant did not include the June 11, 1999 submission until his May 23, 2000, Response to Show Cause Order

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-9521

SYED M.A. HASAN,
Petitioner, v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent.

WOLF CREEK NUCLEAR OPERATING CORPORATION,
Intervenor.

ORDER

Filed July 16, 2002

Before SEYMOUR, McKAY, and MURPHY, Circuit Judges.

Petitioner's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by:
Deputy Clerk